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No. 89-42

IN THE

Supreme Court of the United States

October Term, 1988

MANAGEMENT RECRUITERS INTERNATIONAL, INC.,

and

DAVID MARTH,
Petitioners,

vs.

DEBORAH SWENSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS

1. Does the Federal Arbitration Act pre-empt judicial remedies provided in state anti-discrimination legislation?

2. Did the Court of Appeals properly exercise jurisdiction under the collateral order doctrine in this unique case where the Petitioner did not question jurisdiction until after receiving the adverse ruling of the Appeals Court?

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STATEMENT OF THE CASE

This is not a Title VII action.

Deborah Swenson was employed to manage a personnel-placement or employment agency of Management Recruiters in Bloomington, Minnesota, a

suburb of Minneapolis. At the time she started work, she signed an individual employment contract containing an arbitration clause. This provision required that arbitration of controversies arising out of her employment take place in Cleveland, Ohio, pursuant to the Commercial Arbitration Rules of the American Arbitration Association. Thus, by the terms of the parties' arbitration agreement, she must arbitrate any claims in Cleveland, a city 740 miles from her home in Bloomington.

In March 1987, Deborah Swenson commenced a multi-count suit against her former employer and David Marth, her former supervisor, in Hennepin County District Court, Minneapolis, Minnesota. She alleged two violations of the Minnesota Human Rights Act, as well as five tort claims.

After removing the case to Federal District Court on grounds of diversity, Management Recruiters and Marth successfully moved for a stay of the entire proceedings pursuant to the Federal Arbitration Act. An appeal was timely taken.

After the Court of Appeals for the Eighth Circuit reversed the District Court, Management Recruiters and Marth moved to dismiss the appeal on grounds on lack of subject matter jurisdiction, citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988). On several grounds, among others the bizarre procedural posture of the case, the Court of Appeals denied this motion.

THE WRIT SHOULD NOT BE GRANTED

I. The Federal Arbitration Act does not pre-empt judicial remedies provided in state anti-discrimination legislation.

Once again, the reach—or grasp—of the Federal Arbitration Act is before this Court. Today the question is whether the FAA pre-empts judicial remedies provided in state anti-discrimination statutes. Amazingly, given the torrent of litigation under Title VII of the Civil Rights Act of 1964 and companion state civil rights statutes during the last quarter-century, this question has never been presented to this Court, and only recently been addressed by two federal appeals courts, which appear to be taking divergent paths to its resolution.

The determination of federal pre-emption of judicial remedies provided in state civil rights acts requires an excursion into the oft-quoted legislative history of Title VII. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987). Put another way, it requires the examination of the text and legislative history of one federal statute (Title VII) to determine Congress' views on the pre-emption of companion state legislation (Minnesota Human Rights Act) by still another federal act (FAA). The language and legislative history of Title VII provide only the means or mechanism for deciding the question of FAA pre-emption.

In phrasing the questions raised in their Petition for a Writ of Certiorari, the Petitioners have confused the issue of FAA pre-emption with the means of deciding that question. The threshold question decided by the Eighth Circuit, and now sought to be brought before this Court, is not whether Congress intended to create some

"exception" to the FAA for claims arising under Title VII, but rather whether the FAA pre-empts the judicial remedies provided in state human rights acts.

The Petitioners' confusion is shared by some courts and commentators. *Alford v. Dean Witter Reynolds, Inc.*, 712 F.Supp. 547 (S.D.Tex. 1989) interprets the present action as arising under Title VII. It does not. Larson, *Employment Discrimination*, §9.40, shares this erroneous interpretation of the present case. In *Nicholson v. CPC International, Inc.*, _____ F.2d _____ (3rd Cir. 1989), the present action was cited by a divided appeals panel when holding that FAA does not require arbitration of claims arising under the federal Age Discrimination In Employment Act, but does require arbitration of a pendent age discrimination claim arising under a New Jersey anti-discrimination statute. *Nicholson*—to the extent that it approves FAA pre-emption of judicial remedies provided in a state anti-discrimination act—stands in contrast to the holding of the Eighth Circuit to the present case.

Despite the novelty and importance of this issue, and the emerging dichotomy between the circuits, this Court should not issue a Writ because Congress has spoken not once, but twice against federal pre-emption of state civil rights legislation. The 1964 Civil Rights Act contains no less than two anti-pre-emption provisions. Section 708 of Title VII (42 U.S.C. §2000e-7) and §1104 of Title XI (42 U.S.C. §2000h-4) announce Congress' unmistakable intent that state anti-discrimination legislation will not be pre-empted unless it actually conflicts with federal law. In the debates preceding passage of the 1964 Civil Rights Act, Congress spoke as a veritable Greek chorus for the sanctity of state civil rights legislation. Because Congress has spoken so loudly and clearly against

federal pre-emption of state anti-discrimination legislation, this Court should deny the Writ sought by Petitioners.

The Petitioners argue that the Eighth Circuit partially based its decision on a skepticism about the ability of arbitrators to decide discrimination claims, but that at least since *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court has recognized the increased ability and sophistication of arbitrators. While it is true that the Eighth Circuit took some volleys at arbitrators, its rather jaundiced views must be read in light of the unique facts of the present case. The arbitration provision in the employment contract between Deborah Swenson and Management Recruiters required that arbitration of controversies arising out of her employment take place in Cleveland, Ohio, pursuant to the Commercial Arbitration Rules of the American Arbitration Association. Deborah Swenson was employed to manage a personnel-placement or employment agency in Bloomington, Minnesota, a suburb of Minneapolis. By the terms of the parties' arbitration agreement, she must arbitrate her claims in Cleveland, a city 740 miles away. Moreover, Petitioners conceded below that the American Arbitration Association does not assign only lawyers to serve as arbitrators in commercial disputes. It was the specter of a Cleveland florist or baker or liquor store owner deciding complex cases under the Minnesota Human Rights Act that led the Eighth Circuit to state that arbitration was a less desirable means of adjudication than the judicial remedies required by state legislation. In actuality the basis for its holding that the FAA does not pre-empt judicial remedies under the Minnesota Human Rights Act was the letter and history of Title VII, and this Court's holding in *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36 (1974).

II. The Circuit Court properly exercised jurisdiction.

The jurisdictional issue raised by the Petitioners—whether the collateral-order doctrine permits the appeal of a stay order under the FAA of a suit arising under a state civil rights action—is indeed important, but this is not the time for this Court to address it. It will be recalled that the Petitioners questioned jurisdiction only after they received the adverse decision of the Court of Appeals. These circumstances are too suspect and too unique, if not bizarre, to warrant this Court's review of the Circuit Court's jurisdictional holding.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: Minneapolis, Minnesota
August 10, 1989

Respectfully submitted,

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